HEMANKUMAR SUBRAMANIAM v. PP

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
ZABARIAH MOHD YUSOF JCA
RHODZARIAH BUJANG JCA
[CRIMINAL APPEAL NO: K-05(M)-244-06-2017]
30 JANUARY 2020

CRIMINAL LAW: *Dangerous drugs – Presumption – Double presumptions – Trial judge invoked presumption of possession under s. 37(d) of Dangerous Drugs Act 1952 ('DDA') to invoke presumption of trafficking under s. 37(da) of DDA – Whether element of possession must be 'found' and not 'deemed' – Whether trial judge erred in invoking double presumptions – Whether accused ought to be acquitted and discharged*

CRIMINAL LAW: *Dangerous drugs – Possession – Trial judge invoked presumption of possession under s. 37(d) of Dangerous Drugs Act 1952 ('DDA') to invoke presumption of trafficking under s. 37(da) of DDA – Whether accused person had complete control and custody of room in which drugs were found – Whether lack of exclusivity of use of room, per se, negated custody or control of room by accused person – Whether knowledge inferred by conduct of accused – Whether possession proved – Whether conviction for trafficking to be substituted with conviction for possession*

SP4 arrested the appellant in relation to a case which was not relevant to the instant appeal. Subsequent to the arrest, pursuant to an interrogation by the police, the appellant allegedly gave information which led to the discovery of drugs at the house where the appellant stayed. At the appellant's house, they went to a room which was locked but was opened with the key which SP4 seized from the appellant. In the room, there was, amongst others, a mini fridge. In the fridge, a blue plastic 'Nestle' ice cream container which contained the suspected drugs which was placed on a white piece of paper was recovered. Upon analysis by the chemist, the drugs were found to be methamphetamine weighing 160.3g. The appellant was thus charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The trial judge found a *prima facie* case for the defence to be called. The appellant's defence was that upon arrest, he was taken by the police to his house based on the address stated in his identity card. Upon arriving at the house, three of the police officers were already at his house and the house had been searched. The appellant stated that the room where the drugs were recovered was also used by his parents, nephews, nieces and also his sister. The appellant also denied that the key was seized from him when he was arrested and denied giving

A information to the police that led to the discovery of the drugs in the room. At the end of the defence case, the appellant was presumed to have knowledge of the drugs premised on the presumption under s. 37(d) of the DDA. Hence, the appellant was found guilty of trafficking in dangerous drugs premised on the presumptions under s. 37(d) and 37(da) of the DDA.
B The trial judge found that the appellant failed to rebut the presumptions and therefore convicted the appellant on the charge and sentenced him to death. Hence, this appeal. The issues in this appeal were that the trial judge had erred in law and in fact (i) in applying the double presumptions under ss. 37(d) and 37(da) of the DDA to find the appellant guilty of trafficking
C under s. 39B(1)(a) of the DDA; and (ii) in failing to make a proper evaluation of finding of a *prima facie* case when he failed to make an affirmative finding of possession.

Held (allowing appeal; substituting conviction under s. 39B(1)(a) of DDA with conviction under s. 12(2) read with s. 39A(2) of DDA)
D **Per Zabariah Mohd Yusof JCA delivering the judgment of the court:**

(1) Premised on the Federal Court decision in *Alma Nudo Atenza v. PP & Anor*, the invocation of double presumption by the trial judge to find the appellant guilty of trafficking was untenable in law and therefore erroneous. Presumption of trafficking not founded on proof of
E possession but on presumed possession was a grave departure from the general rule that the prosecution must prove the guilt of an accused beyond reasonable doubt (*Alma Nudo Atenza*). Nevertheless, the appellant could not be ordered to be acquitted and discharged as there was sufficient evidence to hold the appellant guilty on possession.
F (paras 26 & 27)

(2) The lack or absence of exclusivity of the use of a room, *per se*, did not necessarily mean the accused person did not have custody or control of the room. There was nothing in the law that required the prosecution to prove the exclusive use of the room before a conviction under
G s. 39B(1)(a) of the DDA could be sustained. The fact that others had access to the room did not mean the appellant lost his control and custody of the room. Evidence showed that the appellant had on him, at the time when he was arrested, the key to the room where the drugs were kept. There was no evidence of any personal items of SP3 and SP6
H found in the room. The locked room and the personal items of the appellant found in the room implied that the room was used by the appellant and he had complete control and custody of the room. (paras 29, 30 & 42)

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(3) The conduct of the appellant in showing the police his house and his room and the subsequent discovery of the blue 'Nestle' ice cream container which contained the impugned drugs was relevant and admissible as evidence under s. 27 of the EA being evidence of conduct under s. 8 of the EA. If not for the appellant's conduct in showing and leading the police to the drugs, SP4 would not know of the existence of the impugned drugs in the fridge in the room. By that, the appellant must be inferred to have knowledge that the impugned drugs were kept in the fridge in the room. The conduct of the appellant should not be taken in isolation but together with all the other facts and circumstances of the case. The evidence, taken in totality, clearly showed that the appellant had *mens rea* possession of the drugs. He had the power of disposal over them to the exclusion of all others. Therefore, possession by the appellant had been proved. (paras 37 & 44-46)

(4) The conviction under s 39B(1)(a) of the DDA was set aside and substituted with a conviction under s. 12(2) read with s. 39A(2) of the DDA. The appellant was sentenced to 15 years imprisonment from the date of arrest and ten strokes of whipping. (para 47)

Case(s) referred to:
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Kacharji Hariji v. State of Gujarat AIR 1969 Orissa 245 ***(refd)***
Karan Singh v. State of UP [1972] All Cr R 125 ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
Pulukuri Kottaya v. Emperor AIR 1947 PC 67 ***(refd)***
Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***
Wai Chan Leong v. PP [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171 SC ***(refd)***
Y Jeyamuraly Yesiah v. PP [2007] 5 CLJ 605 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 37(da)(xvi), 39A(2), 39B(1)(a)
Evidence Act 1950, s. 27

For the appellant - S Sundarajan; M/s Sundarajan & Assocs
For the respondent - Samihah Rhazali; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Hemankumar Subramaniam [2018] 1 LNS 1474 (overruled).]

Reported by S Barathi

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JUDGMENT

Zabariah Mohd Yusof JCA:

[1] The appellant was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA) as follows:

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> Bahawa kamu pada 22.10.2013 jam lebih kurang 2.00 petang, di rumah No 119, Lorong Kucai 1/3, Taman Kucai, 09600 Lunas, di dalam Daerah Kulim, di dalam negeri Kedah Darul Aman telah di dapati mengedar dadah berbahaya iaitu methamphetamine berat bersih 160.3 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

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[2] After hearing the parties, and taking into consideration the written submissions and the appeal records, we unanimously allowed the appeal. In allowing the appeal, we set aside the conviction by the learned trial judge under s. 39B(1)(a) of the DDA and substituted it with a conviction under s. 12(2) read with s. 39A(2) of the DDA.

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[3] Our reasons for doing so now follow and will constitute the judgment of the court.

Background

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[4] The appellant was arrested by the police on 22 October 2013 at 1.15pm near a temple at Jalan Bukit Lada, Lunas, Kedah pursuant to Lunas Report 3807/13. Pursuant to this arrest, the appellant was charged in the Magistrate's Court. The case pursuant to this particular arrest is not relevant to our present appeal.

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[5] What is relevant is that, subsequent to the said arrest, pursuant to an interrogation by the police, on 22 October 2013 around 2pm, the appellant allegedly gave information to the police which led to the discovery of drugs at a house where the appellant stayed which is located at No. 119, Lorong Kucai 1/3, Taman Kucai, Lunas, Kedah (the said house).

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[6] The case for the prosecution is that, upon information supplied by the appellant to the police, the appellant led Inspector Faroukfashar bin Basaharuddin (SP4) and his team to the said house. Upon arrival at the said house, SP4 saw a woman (SP3) with a child in the house. SP3 is the mother to the appellant and the child is SP3's grandchild, who was about three to four years old then.

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[7] SP4 asked the appellant where was his room and the appellant allegedly led SP4 to a room (the said room). The door to the said room was found to be locked. SP4 used the key (P34) which he had seized from the appellant earlier after his arrest. This key was allegedly found on the appellant when the police arrested him.

[8] In the said room, there was a bed, a cupboard for clothes, a dresser, and a mini-fridge with the brand "Media" (P13). In P13 was found a blue plastic "Nestle" ice cream container (P12A) which has no cover but contained the suspected drugs methamphetamine which was placed on a white piece of paper (P12E). A metal spoon was also found (P14A) in the "Nestle" container. SP5 had also seized a t-shirt brand "Body Glove" (P34), an expired driving license (P35) of the appellant and a small container of lip balm which were all found in the clothes cupboard.

[9] There was another room (second room) whereby SP4 found a scale (P29) and a sealer brand "Impulse Sealer" (P27). All the items were seized by the police.

[10] The investigating officer (SP5) was called by SP4. SP5 arrived at the scene around 3.30pm together with the police photographer. All the items seized were brought to IPD Kulim and a search list (P24) was prepared. A police report was lodged by SP4. At around 6.35pm the items seized together with P24 were handed over to SP5. The handing over list was marked as P25.

[11] SP5 weighed all the suspected drugs and found that the gross weight was 216g. SP5 marked all the items seized and subsequently kept the seized items in his steel cabinet at the office. They were subsequently taken out for the purposes of extracting finger prints and for photographs. The items were then sent to the Chemistry Department for analysis. Upon analysis by the chemist, SP1, the suspected drugs were found to be methamphetamine weighing 160.3g.

Findings Of The Learned Trial Judge

[12] The learned trial judge accepted the evidence of SP1, the chemist as to the results of the analysis that the suspected drugs were methamphetamine as listed under the First Schedule of the DDA. The learned trial judge held that there was no doubt as to the identity of the drugs and there appears to be no break in the chain of the seized items by SP4 until it was handed over to SP1 for analysis which were finally tendered in court.

[13] The defence raised the issue on the admissibility of the statements made by the appellant to the police which led to the discovery of the drugs as there was a failure by the police to administer any caution before the statements were uttered to the police. The learned trial judge agreed with the submission of the prosecution that the admissibility of statements made by the appellant under s. 27 of the Evidence Act 1950 (EA) is not subjected to any caution being administered. The learned trial judge found support in the case of *Siew Yoke Keong v. PP* [2013] 4 CLJ 149. The learned trial judge held that the drugs which were found in the appellant's room was due to the information supplied by the appellant to the police which led to the discovery of the drugs. This implies that the appellant has possession, custody and control of the drugs in question. The learned trial judge also held that the prosecution can rely on the presumption of knowledge under s. 37(d) of the DDA to prove possession.

[14] It is the finding of the learned trial judge that the prosecution had succeeded in proving the appellant had trafficked in drugs after invoking a presumption under s. 37(da)(xvi) of the DDA against the appellant as the drugs exceeded the minimum requirement as stipulated under the same provision. The case of *PP v. Chia Leong Foo* [2000] 4 CLJ 649 was referred to by the learned trial judge.

[15] There were impeachment proceedings commenced by the prosecution against the mother (SP3) and the father (SP6) to the appellant. The learned trial judge ruled that there were material contradictions in the evidence of SP3 and SP6 in court with their statements recorded by the police. However, due to the contradictions between the evidence of the recording officer of SP3's statement and SP3, the learned trial judge gave the benefit of the doubt in favour of SP3. Hence SP3's evidence was not impeached by the prosecution. But as far as SP6 is concerned, the learned trial judge did not accept the explanation given by SP6 as to the contradictions and hence the evidence of SP6 was successfully impeached by the prosecution.

[16] The learned trial judge dismissed the defence's submission that there was no custody and control due to the failure of finding of any fingerprint as the prosecution was relying on the statements made under s. 27 of the EA. The absence of fingerprints is not fatal to the prosecution's case.

[17] The learned trial judge found that a *prima facie* case had been made out for the defence to be called.

[18] The defence of the appellant was that he was arrested whilst he was praying in the temple in Lunas. He was made to wait in the police car outside the police station. His driving licence was taken from his trousers' pocket and the police took him to his house based on the address that is stated in his IC.

When they arrived at his house, three of the police officers were already at his house and his house had been searched. When he was shown the blue "Nestle" plastic container, the appellant denied that it belonged to him and he told the police that he had never seen the said container before.

[19] According to the appellant, the said room where the blue "Nestle" plastic container was found, it was also used by his parents and his nephews and nieces. His father, mother, his niece and himself, sleep in the said room every night. The key to the said room was hanged near the place where all the other keys were hanged. The appellant denied that the key was seized from him when he was arrested at the temple.

[20] The appellant also denied that he had given information to the police that led to the discovery of the drugs in the said room. The appellant denied that the discovery of the seized items like his driving license, sealer and the like in the said room.

[21] The defence submitted that the address of the said house of the appellant was known to the police through his IC and not as alleged, namely, that it was the appellant who led the police to the said house. Apart from the room being accessible to his mother and father, his sister would come to the house every evening after work and used the room while waiting to be fetched by her husband. The cupboard in the room does not belong to the appellant alone but was shared with others. Despite the aforesaid, the learned trial judge found that the appellant had exclusive possession of the said room and held that the information given by the appellant under s. 27 of the EA proved that the appellant had custody and control of the drugs which were found in the fridge in the said room.

[22] As the prosecution had proved custody and control of the drugs in question, the prosecution is entitled to invoke s. 37(d) of the DDA. The appellant was thus presumed to have knowledge of the drugs premised on the presumption under s. 37(d) of the DDA.

[23] Hence, the appellant was found guilty of trafficking in dangerous drugs premised upon the presumptions under s. 37(d) and 37(da) of the DDA. Therefore, it was incumbent upon the appellant to rebut both the presumptions on a balance of probabilities.

[24] The learned trial judge found that the evidence of the appellant in his defence failed to rebut the said presumptions. The learned trial judge therefore convicted the appellant on the said charge and sentenced him to death.

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Issues

[25] Although the appellant raised several issues in the petition of appeal, however, before this court, the appeal revolves around two points which clearly emerged as issues in this appeal, *viz*, that the learned trial judge erred in law and fact when His Lordship:

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(i) applied the double presumptions under s. 37(d) and 37(da) of the DDA to find that the appellant is guilty of trafficking under s. 39B(1)(a) of the same (the double presumption issue);

(ii) failed to make a proper evaluation in finding of a *prima facie* case when he failed to make an affirmative finding of possession (possession issue).

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Our Findings

The Double Presumption Issue

[26] It is clear from the grounds that the learned trial judge had invoked the presumption of possession under s. 37(d) of the DDA to invoke the presumption of trafficking under s. 37(da) of the DDA. Premised on the Federal Court decision of *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780, it was held that:

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> [11] ... To invoke a presumption of trafficking founded not on proof of possession but on presumed possession based on of proof mere custody and control, constituted a grave departure from the general rule that the prosecution was required to prove the guilt of an accused beyond a reasonable doubt.
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> [147] ... the most severe effect, tantamount to being harsh and oppressive, arising from the application of a "presumption upon a presumption" is that the presumed element of possession under sub-s. 37(d) is used to invoke the presumption of trafficking under sub-s. 37(da) without any consideration that the element of possession in sub-s. 37(da) requires a 'found' possession and not a "deemed" possession. The phrase 'any person who is found in possession of' entails an affirmative finding of possession based on adduced evidence. (See: *Mohammed bin Hassan (supra)*).

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Therefore, invoking the double presumption as His Lordship did in making a finding of guilt for trafficking is untenable in law and therefore erroneous.

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[27] Counsel for the appellant urged this court to acquit and discharge the appellant as such application of double presumption violates art. 5(1) of the Constitution. Referring to the case of *Alma Nudo Atenza (supra)*, although the Federal Court quashed the conviction and sentences for both of the appellants

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therein under s. 39B of the DDA, the Federal Court formed the view that there was no reasonable doubt on the guilt of the appellants for possession of the drugs based on the evidence adduced, when they substituted the respective convictions to one of possession under s. 12(2) and punishable under s. 39A(2) of the DDA. However counsel for the appellant in the present appeal submits that possession has not been made out against the appellant, hence, an acquittal and discharge ought to be ordered. With respect, we disagreed with this submission by the appellant as there are sufficient evidence to hold the appellant guilty on possession, as will be enumerated in the subsequent paragraphs of this judgment.

Issue On Possession

[28] The defence submitted that there was no exclusivity of possession of the said room where the drugs were found because the room wherein the drugs were found was accessible to others. In his defence, the appellant said that the room was occupied and used by his mother, father, his niece and his sister.

[29] We disagreed with the defence on the issue of exclusive element of possession of the said room wherein the drugs were found. Lack or absence of exclusivity of the use of a room, *per se*, does not necessarily mean that the accused person does not have custody or control of the room. There are plethora of authorities on this point. The facts and circumstances of the case needs to be scrutinised. The Federal Court case of *PP v. Denish Madhavan* [2009] 2 CLJ 209 which referred to the case of *Leow Nghee Lim v. Regina* [1955] 1 LNS 53 provides an illumination on this issue of exclusivity, wherein Taylor J said:

> ... It is often said that "possession must be exclusive". This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property. Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that "possession must be exclusive" is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

A [18] Thomson J, in *Chan Pean Leon v. Public Prosecutor* [1956] 1 LNS 17, said that "possession" for the purposes of criminal law involves possession itself - which some authorities term "custody" or "control" - and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th edn, p. 304), in which the exclusive element mentioned by Taylor J appears:

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> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

C [19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

[30] Discerning from the aforesaid authorities, there is nothing in the law that requires the prosecution to prove the exclusive use of the said room D before a conviction under s. 39B(1)(a) of the DDA can be sustained. What is needed to be proved by the prosecution is the possession of the drugs by the appellant and that the appellant had trafficked in the same. Proof of possession need not be "exclusive" to the appellant. Hence, if possession need not be exclusive, there is no reason why exclusive use of the room needs E to be proved. The fact that others had access to the room does not mean that the appellant loses his control and custody of the room. It all depends on the facts and circumstances of the case.

[31] Connected to the issue of custody and control in the element of possession, the prosecution needs to also prove knowledge of the drugs on F the part of the appellant. In this respect, the prosecution sought to rely on a statement allegedly made by the appellant under s. 27 of the EA which led to the discovery of the drugs in the said room.

[32] For clarity we reproduced s. 27 of the EA which reads:

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> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

H **[33]** The law on s. 27 of the EA deals with the admissibility of a self-incriminatory statements of accused persons if the statements falls within the category as **information** relating distinctly to the **facts** discovered.

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[34] The word "information" in s. 27 of the Evidence Act 1950, comprises information either verbal or in writing or by gestures. However, the information must relate distinctly to the fact discovered (See *Chong Soon Koy v. PP (supra)*).

Gunn Chit Tuan SCJ in *Wai Chan Leong v. PP* [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171; [1989] 3 MLJ 356, held that the expression "information" in s. 27 was not intended to have the same meaning as a statement. The relevant passage of the judgment of the said case reads:

> It must also be observed that the legislature has used the expression "information" in s. 27 of the Evidence Act and therefore did not intend it to have the same meaning as a statement. Although that expression is not defined in the Evidence Act, unlike a statement, it includes knowledge derived by the person informed by the accused as well as the means to impart that knowledge.

The expression "fact" is defined in s. 3 of the EA as follows:

> "fact" means and includes:
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> (a) any thing, state of things or relation of things capable of being perceived by the senses;
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> (b) any mental condition of which any person is conscious;

In *Chong Soon Koy v. PP (supra)*, Suffian LP held that:

> The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact.

The Privy Council (PC) case of *Pulukuri Kottaya v. Emperor* AIR 1947 PC explained what part of a statement can be admitted as evidence. The statement used in that case was:

> I stabbed with a spear. I hid the spear in a yard in my village. I will show you the place.

It was held by the PC that the whole statement is admissible except the first sentence.

[35] Back to our present appeal, the appellant allegedly said to SP4:

> Tuan ada sikit dadah di rumah saya, saya boleh bawa tunjuk.

According to SP4, this information was given by the appellant after an interrogation at the police station in Lunas where the appellant was brought to after his arrest at the temple on 22 October 2013 around 1.15pm.

[36] The learned trial judge admitted the statement given by the appellant to SP4 under s. 27 of the EA (para. 37 of the grounds). We are of the view that the learned trial judge did not commit any error in this respect.

[37] The conduct of the appellant in showing the police his house and his room and the subsequent discovery of the blue "Nestle" ice cream container which contained the impugned drugs is relevant and admissible as evidence under s. 27 of the EA being evidence of conduct under s. 8 of the EA. (see *Wai Chan Leong v. PP* [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171, *Y Jeyamuraly Yesiah v. PP* [2007] 5 CLJ 605; [2007] 5 MLJ 224, *Karan Singh v. State of UP* [1972] All Cr R 125, *Kacharji Hariji v. State of Gujarat* AIR 1969 Orissa 245).

[38] Premised on the information given by the appellant, drugs were found in the fridge in a locked room which was opened using the key which was seized from the appellant when he was arrested by the police. The information given by the appellant proved that he had knowledge as to the drugs in the fridge in the said room, as the police had no prior knowledge of it before the information.

[39] The defence argued that this room was occupied by SP3, SP6 and the appellant's niece. This can be discerned from the evidence of SP3, SP6 and the investigation officer, SP5. The defence submitted that the said room was therefore not exclusively used by the appellant only, hence, defying the contention that the appellant had custody and control of the room and the drugs in question. The cupboard shows a mixture of clothes which showed that there are more than one person occupying the room, besides the appellant.

[40] Be that as it may, there is the evidence of SP4 who arrested the appellant at the temple. We have said in the early part of this judgment that that arrest is the subject matter of another case which is not relevant to the present appeal. From that arrest, SP4 said he seized a bunch of keys from the appellant. Subsequently, based on the information given by the appellant, the appellant led SP4 to his house and they went to a room in the house which was locked where it was opened with the key which SP 4 had earlier seized from the appellant. It is in this room that the drugs were found in fridge. What is to be noted is that the room was locked and the key was held by the appellant before it was seized by the police. Although the evidence of SP3 and SP6 said that the room was accessible to them at all times, however, the fact that the room was locked when SP4 went to the house, and the key was recovered from the appellant when he was arrested, showed that SP3 was not telling the truth as how could the others access the room when the appellant held the key to the room which was locked at the material time.

[41] It must also be borne in mind that the evidence of SP6 had been impeached successfully by the prosecution and his testimony was unworthy of credit. As for the evidence of SP3, although she went through an impeachment proceeding and the prosecution was unsuccessful in their attempt to impeach her credibility, we are of the view that her evidence ought to be treated with caution. In addition, she is the mother of the appellant, an interested witness and she was giving evidence for her son, who is facing a death sentence.

[42] Although attempts to discredit SP4 were undertaken through the rigorous cross examinations by the defence, his testimony remain unshaken. The learned trial judge found that SP4 was a credible witness and we have no reason to dispute such findings of the trier of fact. Given that the credibility of SP4 was intact, the evidence showed that the appellant had on him at the time when he was arrested, the key to the room wherein the drugs were kept. The t-shirt (P34) and an expired driving license (P35) belonging to the appellant were also found in the cupboard in the said room. There was no evidence of any personal items of SP3 and SP6 found in the said room where the drugs were found. Although it was suggested to SP4 that the license was not found in the cupboard, as it is illogical for an expired driving license to be placed in the cupboard and that the appellant would be carrying it in his wallet with him, SP4 stood firm in his stand during cross-examination that the license was indeed found in the cupboard and since it was an expired driving license, there was no necessity for the appellant to carry it around in his wallet and thus it was left in the cupboard. Therefore the locked room (where the appellant held the key) and the personal items of the appellant which were found in the room implied that the room was used by the appellant and that he had complete control and custody of the room.

[43] It was in evidence by the appellant that at times his sister and her husband would spend the night using the said room. This was a bare assertion coming from the appellant. Even if that was true, it would still not dislodge the issue of control and custody of the room by the appellant. It is illogical for his sister or her husband to place the drugs in the fridge if they were not staying in the house but only spend the nights occasionally when the husband to his sister came back home late. An occasional stay by the sister and her husband does not rid of the appellant's custody and control of the said room.

[44] Based on the facts of the present case, we are of the view that if not for the appellant's conduct in showing and leading the police to the drugs, SP4 would not know the existence of the impugned drugs in the fridge in the said room. By that, the appellant must be inferred to have knowledge that the impugned drugs were kept in the fridge in the said room. The conduct

of the appellant should not be taken in isolation but together with all the other facts and circumstances of the case. The evidence relied upon by the prosecution that were accepted by the learned trial judge are as follows:

(i) At the material time, the appellant was holding the key of the room;

(ii) The room door was locked when the appellant was not in the house;

(iii) It was the appellant who led SP4 to the house and subsequently showed the room;

(iv) The appellant's personal belongings (as stated above) were found inside the cupboard inside the bedroom; and

(v) The impugned drugs were well concealed in the blue "Nestle" ice cream container inside a fridge and were not visible to anyone and who would expect to find drugs being kept in an ice cream container in the fridge.

[45] Looking at the facts and circumstances of the case in totality, the evidence clearly showed that the appellant had *mens rea* possession of the drugs. He had the power of disposal over them to the exclusion of all others. It is highly unlikely anyone else had custody and control of the said room. The evidence points to the appellant who had control of the room and he ensured that the room was locked when he was not around, as evidenced when SP4 and the appellant went to the house, the door to the room was only opened with the key seized from the appellant.

[46] Therefore, given the aforesaid, possession by the appellant of the drugs had been proved. He has knowledge of the drugs when he made sure that the door to the room was locked when he was not around.

Conclusion

[47] In light of the Federal Court decision in *Alma Nudo Atenza v PP (supra)*, we are constrained to allow the appeal. The conviction under s. 39B(1)(a) of the DDA was thereby set aside. In substitution thereof, we convicted the appellant for the offence under s. 12(2) read with s. 39A(2) of the DDA. We were satisfied on the evidence that possession had been proved against the appellant. After hearing mitigation and after taking into consideration the cases referred to by the prosecution and the defence, we were of the view that a sentence of 15 years imprisonment from the date of arrest and ten strokes of whipping were the appropriate sentences to be imposed on the appellant.